DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

NOTICE OF PUBLIC INTEREST

The following is a listing of raze permit applications filed with the Permit Operations Division of the Department of Consumer and Regulatory Affairs:

Application Date	Address	Lot	Square	Use
October 20, 2009	3817 Woodley Road, NW	27	1817	Single family development
October 21, 2009	1053 44th Street, NE	861	5125	2-story single family development
October 21, 2009	2640 Martin Luther King Jr. Avenue, SE	1047	5868	2-story single family development
October 21, 2009	2632 Martin Luther King Jr. Avenue, SE	172	5868	2-story single family development
October 21, 2009	2634 Martin Luther King Jr. Avenue, SE	1000	5868	2-story single family development
October 21, 2009	5500 Central Avenue, SE	29	5282	2-story single family development
October 22, 2009	3006 Martin Luther King Jr. Avenue, SE	18	5952	2-story single family development
October 22, 2009	2642 Martin Luther King Jr. Avenue, SE	1050	5868	2-story single family development
October 22, 2009	5000 Overlook Avenue, SW	14	260	Vacant building
November 2, 2009	915 Spring Road, NW	53	97	Recreation center

For further information, please contact Mr. Tyrone Thomas at the Permit Operations Division via email at Tyrone.Thomas2@dcra.gov or Ms. Cheryl Randall Thomas, Manager of the Permit Center, at (202) 442-4534.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

CONSTRUCTION CODES COORDINATING BOARD

NOTICE OF SCHEDULED MEETING

The Construction Codes Coordinating Board will be holding a scheduled meeting on Wednesday, November 18, 2009 at 10:00 am. The meeting will be held at 941 North Capitol Street, NE, Suite 9500, Washington, D.C. 20002.

Draft board meeting agendas are available on the website of the Department of Consumer and Regulatory Affairs at dcra.dc.gov, by clicking on the "Construction Codes Coordinating Board (CCCB)" tab on the main page.

BOARD OF ELECTIONS AND ETHICS

CERTIFICATION OF ANC/SMD VACANCIES

The District of Columbia Board of Elections and Ethics hereby gives notice that there is a vacancy in one (1) Advisory Neighborhood Commission office, certified pursuant to D.C. Official Code § 1-309.06(d)(2); 2001 Ed; 2006 Repl. Vol.

VACANT: 1A06

Petition Circulation Period: **Monday, November 9, 2009 thru Monday, November 30, 2009**
Petition Challenge Period: **Thursday**, **December 3, 2009 thru Wednesday, December 9, 2009**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions at the following location:

D.C. Board of Elections and Ethics
441 - 4th Street, NW, Room 250N
Washington, DC 20001

For more information, the public may call **727-2525**.

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Certification of Filling Vacancies
In Advisory Neighborhood Commissions

Pursuant to D.C. Official Code §1-309.06(d)(6)(G) and the resolution transmitted to the District of Columbia Board of Elections and Ethics "Board" from the affected Advisory Neighborhood Commission, the Board hereby certifies that the vacancy has been filled in the following single-member district by the individual listed below:

Victor Silveira
Single-Member District 3C07

EXECUTIVE OFFICE OF THE MAYOR

SERVE DC- THE MAYOR'S OFFICE ON VOLUNTEERISM
DC COMMISSION ON NATIONAL AND
COMMUNITY SERVICE

PUBLIC MEETING

The mission of Serve DC- The Mayor's Office on Volunteerism is to promote the District of Columbia's spirit of service through national service, partnerships and volunteerism.

The DC Commission on National and Community Service (Serve DC) is pleased to announce its next Commission meeting on:

Saturday, December 5, 2009, 5 P.M. – 7 P.M.
Hotel Palomar
2121 P Street, NW
Washington, DC 20037

All meetings are open to the public. Meeting minutes can be obtained from 441 4th Street NW, Suite 1140N, Washington, DC 20001.

For additional information or to request a copy of the minutes, please call 202-727-7925.

FRIENDSHIP PUBLIC CHARTER SCHOOL

NOTICE OF REQUEST FOR PROPOSAL

Friendship Public Charter School (FPCS) is soliciting proposals for the following service

CONSULTANT TO CONDUCT AN EMERGENCY MEDICAL TECHNICIAN TRAINING PROGRAM for students that will support Friendship Public Charter School's Allied Health Program.

An electronic copy of the full Request for Proposal (RFP) may be requested by contacting:

Valerie Holmes
vholmes@friendshipschools.org
202-281.1722

DEPARTMENT OF HEALTH
COMMUNITY HEALTH ADMINISTRATION

NOTICE OF FUNDING AVAILABILITY
For RFA # CHA_11.06.09

Chronic Care Initiative – Cycle 2

The Government of the District of Columbia, Department of Health Community Health Administration is soliciting applications from qualified nonprofit applicants to participate in the Chronic Care Initiative in reshaping the delivery of services for persons affected by cardiovascular disease, hypertension, stroke, diabetes, chronic kidney disease, or chronic obstructive lung disease. This group of conditions includes early risk factors and pre-clinical conditions, through to advanced illness and death.

These funds will be awarded by the District of Columbia Community Health Administration (CHA) using funds authorized by the Community Access to Health Care Amendment Act of 2006.

The Community Access legislation authorizes awards up to $10 million of which approximately half was awarded in Cycle 1 and we expect to award approximately $3.5 million in Cycle 2 through this Request for Applications (RFA) depending on the quality of applications. Eligibility is limited to nonprofit organizations serving residents of the District of Columbia. Awards will vary in length and size. See RFA for specifics.

The RFA will be released on Friday, November 6, 2009 and the deadline for submission is Monday, December 7, 2007 at 4:00 pm. Applications may be obtained from the Department of Health, 825 North Capitol St., NE – 3rd Floor Reception Area. The RFA will also be available on the Office of Partnerships and Grants Services website, www.opgs.dc.gov under the District Grants Clearinghouse. A Pre-Application meeting will be held in the District of Columbia at the DC Department of Health Headquarters, 825 North Capitol St, NE, Washington, DC 20002 on Thursday, November 12, 2009, in conference room 4131 from 2:00pm to 4:00 pm

Please contact Charles Nichols at (202) 442-9342 for additional information.

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

NOTICE OF DISPOSITION

DHCD to dispose of vacant property using public listing service

The Department of Housing and Community Development's Property Acquisition and Disposition Division (PADD) has contracted with Alex Cooper Real Estate Services to serve as the listing agent for four government-owned vacant properties.

One of PADD's main objectives is to stabilize the District's neighborhoods by eliminating slum and blight and returning vacant properties to productive use. In January, PADD contracted with Alex Cooper to auction almost 30 vacant single- and multi-family properties owned by the District of Columbia. It was a new strategy for DHCD's smallest division to help the city reduce blight and raise money for affordable housing.

Nearly all of the properties auctioned were bid upon however, several did not reach settlement. The unsold properties remained in PADD's vacant property inventory. PADD selected four of the unsold auction properties to test another new strategy – use realtors to list some of the government-owned vacant properties in the Metropolitan Regional Information Systems (MRIS) multiple listings real estate service. To make an offer on a property, potential buyers will simply contact the listing agent, in this instance, Alex Cooper.

Baltimore, Philadelphia and St. Louis have also used the multiple listings service to dispose of select city-owned property. It is anticipated that the endeavor will be successful here and could attract economic development into underserved communities and help transform neighborhoods.

The four properties are 475 Florida Avenue NW (Ward 1); 3620 Rock Creek Church Road NW (Ward 1), 805 7th Street NE (Ward 6), and 627 Keefer Place NW (Ward 1). Details about the properties, full offer instructions, and a summary of the sale process are available on the Alex Cooper website at http://dhcd.alexcooper.com. Interested buyers must follow the required format in the offer instructions in order to submit an offer. The instructions are available in both PDF format.

To learn more about DHCD's programs and initiatives to create and preserve opportunities for affordable housing and economic development and to revitalize underserved communities in the District of Columbia, call (202)442-7200 or visit online www.dhcd.dc.gov.

HOWARD ROAD ACADEMY

REQUEST FOR PROPOSALS

Special Education Services Contract

The Howard Road Academy and its management firm, Mosaica Education, Inc., invite proposals for the provision of Special Education Services. Proposals are to be received by Howard Road Academy, 701 Howard Road SE, Washington DC 20020-7101 attention Dianna Washington, on **November 16th** and not later than **12:00 pm**. Bid specifications may be obtained at the school, at dwashington@howardroadacademy.org. Any questions regarding this bid must be submitted in writing to the contact person before the RFP deadline.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17833-A of Timothy Lawrence, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under § 403, and a variance from the alley setback requirements under subsection 2300.4, to construct a private garage on an alley lot in the R-4 District at premises 1665 Harvard Street, N.W. (Square 2588, Lot 827).

HEARING DATE: October 28, 2008
DECISION DATE: December 2, 2008
DATE OF DECISION ON RECONSIDERATION: June 9, 2009

ORDER ON RECONSIDERATION

Procedural Background

This application was filed on May 25, 2008 by Mr. Timothy Lawrence ("Applicant"), the owner of the property that is the subject of this application ("subject property"). The application requested variances in order to permit the construction of a garage on an alley lot belonging to the Applicant. The alley lot is not adjacent to the lot on which the Applicant's dwelling is located, but to that of his next door neighbor.

The Board held a hearing on the application and decided, at a December 2, 2008 public decision meeting, to deny it. Board Order No. 17833 ("Order") denying the application was issued on May 4, 2009 (Exhibit No. 43), and on May 14, 2009, the Applicant filed a motion requesting reconsideration of the Board's decision ("motion"), Exhibit No. 36, and did so within the time period set forth in 11 DCMR § 3126.2. In his motion, the Applicant sets forth seven specific grounds for the reconsideration request. The party who opposed the application filed a response to the motion in which it briefly addressed each of the specific grounds alleged. Exhibit No. 42.

At its public decision meeting on June 9, 2009, the Board took up the Applicant's request for reconsideration. The Board addressed the grounds alleged as support for the reconsideration and deliberated on them, but was un-persuaded that any change in the decision was necessary. The Board therefore denied the reconsideration by a vote of 3-0-2. An explanation for the Board's decision follows.

Discussion

The Applicant first claims that the Board's decision deprives him of the only "improved use permitted by right" on the subject property. Even if true, the Board is not required to grant a variance. The issue is not one of use, but of the structure that houses the use. The Zoning Regulations require that a private garage constructed on an alley lot must be set back at least twelve feet (12 ft.) from the center line of the alley on which the lot abuts. For the purposes of this motion, the Board accepts the Applicant's contention that the alley lot is too small both to construct

a usable garage and meet this requirement. This does not deprive the Applicant of all uses of the lot. He may continue to use the space for parking. Nor does it mean that he may not be able to construct an Artist's Studio if approved by the Board per 11 DCMR § 2507.6, since no similar alley set back applies. The Board has therefore not deprived the Applicant of all uses to which the lot may be put, including uses for which improvements are associated.

The Applicant next argues that the Board applied the incorrect standard of relief. He claims that the Board applied the higher use variance standard of "undue hardship" rather than the lower area variance standard of "practical difficulties." It appears from his motion that he thinks the Board erroneously viewed this application as a use change from parking to "secured parking." Exhibit No. 36, at 3. There is, however, no indication in the Order or during its deliberations that the Board viewed the application as requesting a use change or that it applied the more stringent standard of proof applicable to a use variance request. At page 5, the Order states clearly that the Applicant "is requesting area variances." The Order addresses the practical difficulty standard both in the Findings of Fact (Nos. 19-25) and in the Conclusions of Law (at 6), and never discusses the undue hardship standard necessary for a use variance.

The Applicant's next point is that he never had an opportunity to address statements made during deliberations which, according to the Applicant, implied "that the variance request could be granted if unspecified design concerns were met." Exhibit No. 36, at 3, and *see* Transcript of December 2, 2008 decision meeting, at 29-30. The Board disagrees that any such implication was made or intended by the referenced statements. Although there is nothing to preclude a Board member from speculating that a different design approach might have met matter-of-right standards, such a statement is irrelevant to the Board's decision on the merits. And, even if it were, no party may address the Board members during their deliberations. The process for a party to dispute a conclusion reached by the Board is through a motion for reconsideration, which may only seek to refute those facts and conclusions as are stated in the Board's order.

The Applicant next claims that the Order is incorrect in asserting that the Board agreed with the recommendation of denial of Advisory Neighborhood Commission ("ANC") 1D. Apparently the Applicant believes that the Board cannot say it agreed with the ANC's ultimate recommendation of denial because the Order's basis for reaching that conclusion (failure to prove the second prong of the variance test) differed from that relied upon by the ANC (failure to prove the third prong). Despite these differing bases, the ultimate conclusion reached was the same; that the application should be denied. It is not erroneous for an order denying an application to indicate agreement with an ANC recommendation that it do so, even if the reasons that led each to the conclusion of denial differed.

The Applicant's fifth ground for reconsideration is that the Board overstated the severity of the variances. The Applicant, however, instead of supplying evidence of such alleged "overstatement," attempts to explain how lot occupancy relief would not be necessary "if this were a minimum size lot" or "if the two lots were combined" or the alley closed. Exhibit No. 36, at 4. The Board fails to see how speculating about various scenarios shows that the Board overstated the severity of the variance relief. The fact of the matter is that this is a small lot of 557 square feet, the proposed

garage is limited to a 40% lot occupancy, and it would have had a 100% lot occupancy. These are not overstatements, but facts. *See*, Exhibit No. 43, Findings of Fact Nos. 1 and 13.

The Applicant alleges that he is being denied a "right allowed all other lots in the square without variance" relief. Exhibit No. 36, at 4. He claims that all other lots abutting the alley would be able to construct a garage by right because each of these lots has a row dwelling on it and so, would be allowed a 60% lot coverage, whereas a 40% lot coverage applies for all other structures, including his proposed garage. 11 DCMR § 403.2. It is impossible to know whether each of the other lots abutting the alley could construct a by-right garage, unless the dimensions of each lot, dwelling, and proposed garage were known.[1] Further, the Applicant has the same rights as all other homeowners on his block with respect to construction of a garage at the rear of his dwelling on his own, larger lot. He is being denied no rights granted to others.

The Applicant's last argument is that the Board "in effect approved" the alley setback variance by mentioning during deliberations that a rear fence with a gate may provide security for the Applicant. Exhibit No. 36, at 5 and *see* Transcript of December 2, 2008 decision meeting at 31. The Applicant implies that, with regard to maneuverability of vehicles, there is really no difference between having a fence at the edge of the alley or a garage wall, and that, therefore, by referring to the fence, the Board somehow "approved" the garage wall at that location.

The mentioning of the fence during the Board's deliberations does not imply the granting of any relief. No amount of discussion during deliberations constitutes the granting of relief -- the Board can only approve relief by a motion passed by a majority of its members. 11 DCMR § 3125.2. It cannot *de facto* approve something, nor can it approve something – the fence – that is not before it in an application.

For all the reasons stated above, the Board concludes that the Applicant failed to demonstrate an error by the Board in its decision and Order No. 17833. Accordingly, the motion requesting reconsideration is hereby **DENIED.**

VOTE: 3-0-2 (Marc D. Loud, Shane L. Dettman, and Anthony J. Hood, to DENY. Two Mayoral appointees (vacant) not participating or voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of Board members approved the issuance of this order.

FINAL DATE OF ORDER: OCTOBER 30, 2009

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

[1]In any event, it is likely that a special exception would be required. *See*, 11 DCMR §223.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17747 of Stephanie Wallace, pursuant to 11 DCMR §§ 3100 and 3101, from a September 28, 2007 decision of the Zoning Administrator to deny the issuance of a building permit allowing the reconstruction of a portion of a pre-existing one-family dwelling in the R-1-B District at premises 5013 Belt Road, N.W. (Square 1756, Lot 64).

HEARING DATES: April 29, May 20, July 15, August 1, 2008
DECISION DATES: June 3, September 16, 2008

DECISION AND ORDER

This appeal was submitted October 19, 2007 by Stephanie Wallace ("Appellant"), who challenged a decision by the Zoning Administrator to deny an application, submitted April 17, 2007, for a building permit to revise a prior building permit so as to allow reconstruction of "a pre-existing portion of a single family house with a non-conforming side yard" concerning property owned by the Appellant at 5013 Belt Road, N.W. (Square 1756, Lot 64). The appeal concerns a project involving construction of a rear addition to a one-family dwelling, with nonconforming side yards, that was disrupted by the discovery of structural damage to the original house due to previous termite infestation and rot, and the eventual removal of the entire original house. The Zoning Administrator denied the Appellant's request for a building permit that would have permitted reconstruction of the original house with five-foot side yards, finding that new construction must comply with the current eight-foot side yard requirement because the nonconforming structure was no longer in existence and could not be reconstructed because it had not been damaged by casualty or act of God. Following a public hearing, the Board voted at its public meeting on September 16, 2008 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated October 23, 2007, the Office of Zoning provided notice of the appeal to the Office of Planning; the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("DCRA"); the Councilmember for Ward 3; Advisory Neighborhood Commission ("ANC") 3E, the ANC in which the subject property was located; and Single Member District/ANC 3E04. Pursuant to 11 DCMR § 3112.14, on February 6, 2008 the Office of Zoning mailed letters providing notice of the hearing to the Appellant, the Zoning Administrator, and ANC 3E. Notice was also published in the D.C. Register on February 15, 2008 (55 DCR 1569).

Party Status. The Appellant and ANC 3E were automatically parties in this proceeding. The Board granted requests to intervene in the appeal submitted by John Lemoine, who owns and

resides in a house abutting the subject property to the south, and by Mary Grumbine and Jack Simmons, who own and reside in a house on Garrison Street whose rear yard abuts the subject property.

Appellant's Case. The appeal challenged a decision made by the Zoning Administrator to deny a building permit application (known as the fifth building permit application), submitted by the Appellant on April 17, 2007, to revise a prior building permit (known as the first permit), issued December 9, 2004, that had authorized construction of a rear addition to a one-family detached dwelling with nonconforming side yards. The requested revision would have allowed the Appellant to reconstruct the original dwelling, which had been removed. According to the Appellant, three prior building permits – including a permit to demolish the existing house – had been sought "based on guidance from DCRA in an effort to preserve the existing single family house and to continue the project as originally planned." The Appellant contended that the Zoning Administrator's decision was an attempt "to retract DCRA's previous approval to allow Appellant to demolish and rebuild an existing structurally unstable single-family house per the existing permits and plans." According to the Appellant, under the circumstances, the Zoning Administrator was estopped from denying the application to revise the original building permit, because the Appellant had made expensive and permanent improvements while acting in good faith and in justifiable reliance on affirmative and repeated acts of DCRA, without notice of any kind that the improvements violated the Zoning Regulations, and the equities and fundamental fairness overwhelmingly favored the Appellant. The Appellant also argued that denial of the permit application was barred by the doctrine of laches because "the District 'slept on its rights' with respect to any claim as to the ability of Appellant to rebuild the structurally unsound single family house."

Zoning Administrator. The Department of Consumer and Regulatory Affairs argued that the appeal should be denied because the Zoning Administrator had accurately interpreted the Zoning Regulations. At the public hearing, the Zoning Administrator reiterated his decision to deny the Appellant's application for a fifth building permit. He noted that, prior to the issuance of the first building permit to the Appellant, there was a nonconforming structure on the subject property, but that structure had been removed in the course of a piecemeal process. Upon review of the application for the fifth building permit, which showed footers for a new building not meeting the eight-foot setback requirements, the Zoning Administrator observed that the nonconforming structure no longer existed on the site, and considered whether the structure had been damaged or destroyed by an act of God or casualty within the meaning of § 2001.6 of the Zoning Regulations, so that the nonconforming building could be reconstructed so long as the cost of reconstruction was not more than 75 percent of the cost of reconstructing the entire structure.

The Zoning Administrator testified that, since "casualty" and "act of God" are not defined in the Zoning Regulations, he consulted Merriam-Webster's Unabridged Dictionary. Based on the dictionary definitions and his professional experience, the Zoning Administrator decided that termite damage and rot did not constitute a casualty or act of God and therefore that § 2001.6 was inapplicable to permit reconstruction of the Appellant's nonconforming structure. The

Zoning Administrator cited fires, storms, earthquakes, floods, hurricanes, wind damage, and damage from vehicles – all of which are caused by sudden and unforeseen events – as examples of a casualty or act of God. According to the Zoning Administrator, the Appellant's situation was not an example of damage by casualty or act of God because the damage to the nonconforming house caused by termite activity and rot was the result of a lack of maintenance of the structure and not either a sudden occurrence resulting from a casualty or a natural disaster such as an act of God. The Zoning Administrator concluded that he lacked authority to approve the fifth permit application because that permit would have allowed new construction not meeting the side yard requirements, where the previously existing nonconforming structure had effectively been razed – not destroyed by casualty or act of God – and the nonconforming condition, which would have permitted smaller side yards, was gone.

Intervenors. The intervenors argued generally that the decision of the Zoning Administrator to deny the Appellant's permit application should be upheld. John Lemoine contended that the Appellant intentionally destroyed the original house in a piecemeal fashion while simultaneously building a completely new structure that would be much larger than would otherwise have been permitted under the Zoning Regulations. He also argued that the damage caused to the house by termites and rot was not due to an act of God or casualty but was the result of a negligent lack of maintenance, and that the Appellant was on notice of the decrepit state of the property and acted in bad faith, which barred any claim of estoppel. Jack Simmons and Mary Grumbine asserted that the Zoning Administrator properly determined that the fifth building permit must be denied because (i) at the time of the permit application, the house with nonconforming side yards had ceased to exist, and the absence of any nonconforming structure precluded the grandfathering of the nonconforming side-yard setbacks for any new construction, which must instead conform to the eight-foot side-yard setbacks applicable in the R-1-B zone; and (ii) the destruction of the house was the result of a lack of maintenance and not the result of an act of God or a casualty that would permit the rebuilding of the nonconforming structure, because – unlike termite damage – both an act of God and a casualty require a sudden loss or an occurrence that is not preventable by exercise of reasonable care.

The intervenors also disputed the Appellant's contention that the government was estopped or barred by laches from denying the building permit application, asserting that the doctrine of estoppel is rarely applied against the government because of the public interest in the enforcement of the zoning laws and that the doctrine was not applicable under the circumstances because the Appellant had no reasonable reliance and had not proceeded in good faith. The intervenors also argued that the government was not barred by laches from denying the Appellant's permit application given the absence of undue delay in reviewing and acting on the application.

ANC Report. At a properly noticed, regularly scheduled meeting on April 10, 2008, with a quorum present, ANC 3E approved a resolution, by a vote of 3-0, in opposition to the appeal. ANC 3E urged the Board to affirm the Zoning Administrator's decision to deny the Appellant's fifth building permit. According to the ANC, the Appellant's application for a fifth permit was denied because no part of the original house remained, and "[a]pplicable zoning regulations

permit the construction of an addition with a non-conforming side yard only if it is, in fact, an addition to a non-conforming side yard…. The Zoning Administrator properly concluded that there was no longer any basis for allowing the developer to build an extension with a non-conforming side yard as the original side yard ceased to exist."

The ANC asserted that "[t]ermite damage cannot be considered an 'Act of God' or 'casualty'" because the termite damage was not a sudden event or occurrence, but "festered over years." ANC 3E contended that the Appellant had failed "to take reasonable precautions regarding the termite damage" or "high water levels on the street," and "as a result encountered serious roadblocks," but neither the termites nor the high water levels could be considered an act of God or casualty. The ANC concluded that any claim by the Appellant that the District was estopped from denying the fifth building permit must fail because the Appellant had failed to act appropriately under the circumstances.

Motion for Summary Judgment. On April 14, 2008, the Appellant submitted a prehearing statement and motion for summary judgment. The motion alleged various "material facts not in dispute" and argued that the Appellant had "the absolute right to reconstruct the collapsed existing single-family house as requested" through the permit application submitted April 17, 2007. According to the Appellant, the Zoning Administrator's decision was incorrect as a matter of law, and DCRA should be directed to issue the requested fifth permit and any other permits required to reconstruct the portion of the original single-family house that was "destroyed by casualty and/or Act of God."

The Appellant's motion for summary judgment was opposed by the intervenors, who challenged several of the "material facts not in dispute" alleged by the Appellant and argued that the Zoning Administrator's determination should be upheld. The motion was also opposed by DCRA, who argued that the Appellant failed to demonstrate that there was no genuine factual dispute, that equitable estoppel did not prevent the District from denying a building permit application "that is violative of District law," and that "the doctrine of laches was not applicable when the District has responded promptly to every amended permit application filed by the Appellant."

Motion to Dismiss. On April 24, 2008, intervenors Mary Grumbine and Jack Simmons submitted a motion asking the Board to dismiss the appeal on the ground that the appeal failed to set forth a claim on which relief could be granted, and to issue an order directing the Appellant to raze the structure currently located on the subject property.[1] The motion asserted that the Zoning Administrator had properly denied the Appellant's application for a building permit because the absence of the pre-existing structure on the subject property, which had been destroyed through a lack of maintenance and not through a casualty or Act of God, precluded the "grandfather" application of the non-conforming side-yard setbacks.

On May 9, 2008, DCRA filed a response to the motion to dismiss indicating DCRA's support for the Intervenors' position that the determination of the Zoning Administrator should be upheld,

[1] The motion to dismiss was supported by intervenor John Lemoine in his response submitted on May 16, 2008.

but declining to assert that the appeal should be dismissed for failure to state a claim on which relief could be granted. Also on May 9, 2008, the Appellant submitted her opposition to the Intervenors' motion. The Appellant claimed a lack of "timely knowledge of the latent structural defects which created the casualty and imminent collapse of the structure," reliance on misrepresentations by the prior owner that the subject property had no history of termite infestation or of foundation or structural defects, and good-faith reliance on the directions of DCRA and the fourth building permit, which authorized the partial demolition and reconstruction of the structurally damaged portion of the existing house.

At a public meeting on June 3, 2008, the Board denied the Appellant's motion for summary judgment because some of the material facts in the case were in dispute. The Board also denied the intervenors' motion to dismiss, finding that the Appellant had stated a claim on which relief could be granted by alleging that the Zoning Administrator had erred in interpreting §§ 405.8 and 2001.6 of the Zoning Regulations in denying the Appellant's application for a building permit.

Motion for continuance. On July 15, 2008, the intervenors requested a continuance because one intervenor was unable to attend the hearing for medical reasons. DCRA did not object, and the ANC was in support of the request, but the Appellant objected to additional delay in hearing the case. The Board denied the motion for continuance at its hearing on July 15, 2008.

Motion to amend appeal. On June 2, 2008, the Appellant submitted a motion to amend the appeal "to incorporate [a] directly related denial by the Zoning Administrator" under § 401.1. The motion stated that the Appellant had asked the Zoning Administrator to accept or deny her "request under 11 DCMR § 401.1 to 'enlarge or replace' the existing rear addition as a matter-of-right." The request was made by letter dated May 29, 2008 but the "Zoning Administrator has not timely responded to the Appellant's request which constitutes a denial and/or refusal." By submission dated June 26, 2008, intervenor John Lemoine opposed the motion to amend the appeal, arguing, among other things, that the "incomplete, nonconforming Addition in place at the site" could not be built as a matter of right. By resolution approved at a regularly scheduled meeting on July 10, 2008, ANC 3E also opposed the Appellant's motion to amend the appeal, "because it seeks to put before the BZA issues that are not yet ripe for appeal as they have not yet been considered by the ZA." At the hearing on July 15, 2008, the Board denied the motion to amend the appeal, finding that the Appellant's letter to the Zoning Administrator did not reflect a decision by the Zoning Administrator.

FINDINGS OF FACT

1. The subject property is located at 5013 Belt Road, N.W. (Square 1756, Lot 64). The parcel is rectangular, with a lot width of 30 feet and a depth of 150 feet. The lot area is 4,500 square feet.

2. When the Appellant acquired the property, in April 2004, the lot was improved with a two-story, wood-frame one-family dwelling built in 1933. The house had side yards five feet wide on each side.

3. The property is zoned R-1-B and is nonconforming with respect to lot area, lot width, and side yard. The R-1-B zone requires a minimum lot area of 5,000 square feet (§ 401.3), a minimum lot width of 50 feet (§ 401.3), and side yards of at least eight feet (§ 405.9). In the case of a building existing on or before May 12, 1958 that has a side yard less than eight feet wide, an extension or addition may be made to the building so long as the width of the existing side yard is at least five feet and will not be decreased by the new construction. 11 DCMR § 405.8.

4. In February 2004, the subject property was listed for sale "'as is' – including termite." The Appellant did not obtain a termite inspection of the house before or after purchasing the property.

5. The Appellant described plans to renovate the house by installing modern plumbing, electrical, and HVAC systems and to construct a new addition – two and three-quarter stories over a finished basement – at the rear of the dwelling. The original house was generally rectangular, approximately 16 feet wide in the front segment and 20 feet wide at the rear, and 28 feet long. The addition was planned as a rectangle, 20 feet wide by 40 feet long, with side yards five feet wide.

6. In July or August 2004, the Appellant applied for a building permit for the addition. Building Permit No. B456280 (the "first permit") was issued December 9, 2004 to authorize construction of an "addition to single family house to include new kitchen, family room, master suite, baths, attic & basement. Separate elec., plumb., & mech. installation permits are required."

7. In January and February 2005, the Appellant began work on the roof of the house as well as interior demolition. A stop work order was issued in February 2005 upon a complaint that no permit was posted on the site, and was subsequently resolved.

8. In March 2005, the rear portion on the house dropped in the course of the Appellant's work on removing the house's plumbing system. Upon investigation of the dropped portion of the house, the Appellant discovered that the house had been severely damaged by termites and rot due to prolonged exposure to moisture from the ground such that the foundation and footings could not be repaired and the house had become structurally unsound. The damage was not recent but had occurred over a period of years.

9. Between March 5 and 8, 2005, the Appellant removed the remainder of the rear of the house in an effort to prevent failure of the entire structure. A stop work order was issued the same month on the grounds that the Appellant was "working beyond the scope. Razing of building. Need to resubmit plans and plat."

10. On September 22, 2005 the Appellant applied for an amended building permit to allow for "underpinning." Building Permit No. B477334 (the "second permit") was issued October 4, 2005 with the following description of work: "Revise Permit Number B46820 to delete the structural drawing S-1 which was not adequate for this project and substitute five new signed and sealed drawings. Underpin a portion of the existing building." The "conditions/ restrictions" identified on the permit were: "Entirely on owner's land with added cost (underpinning not originally permitted). Remove and replace and [*sic*] damaged wood in accordance with the structural plans to preserve the integrity of the project. All other conditions of the original building permit are to remain the same except [as] amended per attached plans with added cost."

11. The Appellant began excavation for the rear addition on November 29, 2005. The excavation caved in due to a high water table, making the ground unstable. The Appellant attempted to stabilize the excavation site and installed shoring for the planned addition.

12. In March 2006 the Appellant submitted another building permit application to delete the foundation drawing and the cross section elevation and to substitute a revised basement structural drawing and revised cross section elevation drawing. The Appellant also requested authorization to raise the house approximately four feet to correspond to the level of the addition, which had a higher foundation due to a high water table and ground water.

13. Building Permit No. 91338 (the "third permit") was issued April 21, 2006 with the following description of work: "Revise Building Permit Number B # 46820 to delete the foundation drawing and the cross section elevation and substitute a revised bsmt, structural drawing and revised cross section elevation drawing. This permit revision will raise the house up by approximately four feet."

14. In October and November 2006, the Appellant framed the addition. Upon preparation to lift the front of the house, the Appellant discovered additional termite damage and rot in the front portion of the house.

15. By letter to DCRA dated January 9, 2007, a structural engineering consultant hired by the Appellant, Advanced Structural Engineering, LLC, stated its determination, made after an inspection of the structural integrity of the building, that "the structural elements of the house are not in any shape to be lifted without causing some major damage and possible collapse of the house." The structural engineer wrote that the safer course would be to demolish the existing structure and rebuild it to match the existing plans and specifications, consistent with current building code requirements.

16. In February 2007, the Appellant submitted a building permit application for approval to perform a partial demolition of the house. Building Permit No. B103710 (the "fourth permit") was issued February 14, 2007 to authorize the Appellant to "demolish a portion

of and [*sic*] existing SFD due to the structural integrity and possible collapse of the house which is dangerously unsound. Rebuild structure to current building code specifications per per [*sic*] existing permits and plans."

17. The remaining portion of the house was demolished in March 2007. On March 21, 2007, a stop work order was issued by the DCRA Building Inspection Division. The violation was described as "Entire house. Exceed scope of building permit. Building all new SFD. Ongoing work [does] not match approved plans on site!!! Stop work order posted."

18. On April 17, 2007, the Appellant submitted an application for a building permit (the "fifth permit") with the following description of work: "revision to B468280 to reflect new footer and new (2) story structure replacing existing."

19. By letter dated September 28, 2007, the Zoning Administrator informed counsel for the Appellant that he was "unable to approve the pending building permit to reconstruct the non-conforming single family house" because "under 11 DCMR 405.8, an existing house with a non-conforming side yard may be extended with only a five foot wide for the addition, instead of the otherwise normally required eight foot side yard, if a non-conforming side yard is present. However, the existing side yard must be present to utilize this provision." According to the Zoning Administrator, in this case, where a building permit was issued for a rear addition to an existing house with nonconforming five-foot side yards, the ability to utilize § 405.8 "ended with the demolition of the house." Because "there is not any existing non-conforming yard to extend and with the original house's removal, the construction becomes subject to the eight foot side yard setback requirement for the subject R-1-B District."

20. The September 28, 2007 letter also stated that 11 DCMR § 2001.6[2] did not apply to the subject property because the Zoning Administrator could not "find that the termite damage that…made the building structurally unsound is either a casualty or act of God. The damage resulting from this termite activity is a result of lack of maintenance of the structure, not … either a sudden occurrence resulting from a 'casualty' or a natural disaster such as an 'act of God.'"

21. On October 22, 2007 the Appellant filed an appeal of the Zoning Administrator's decision, made September 28, 2007, not to issue the fifth building permit sought by the Appellant to permit the reconstruction of the house.

[2] Subsection 2001.6 states that:

> If a casualty or act of God results in damage to an extent of seventy-five percent (75%) or less of the cost of reconstructing the entire structure, the structure may be restored or reconstructed to its previous condition or to a more conforming condition; provided, that the reconstruction or restoration shall be started within twenty-four (24) months of the date of the destruction and continued diligently to completion.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by Section 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. 11 DCMR §§ 3100.2, 3200.2. In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. 11 DCMR § 3100.4.

An appeal must be filed within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). The Board may extend the 60-day deadline in case of exceptional circumstances outside the appellant's control. 11 DCMR § 3112.2(d). In this case, the Appellant filed an appeal on October 19, 2007 that challenged a decision made by the Zoning Administrator on September 28, 2007 not to approve an application for a building permit submitted by the Appellant. The appeal was filed within the 60-day deadline and therefore was timely.

Based on the findings of fact, the Board was not persuaded by the Appellant that an error occurred in any decision made in the administration of the Zoning Regulations with respect to the Zoning Administrator's decision to deny the Appellant's application for a building permit that would have allowed reconstruction of the house with nonconforming side yards, because the Appellant's removal of the house had eliminated the nonconforming side yards and the termite infestation and rot that had damaged the house did not constitute a casualty or act of God that could allow reconstruction of a nonconforming structure under § 2001.6.

Generally, a one-family dwelling located in the R-1-B district must have side yards that are at least eight feet wide. 11 DCMR § 405.9. However, pursuant to § 405.8, an addition may be made to a house that has a side yard less than eight feet wide so long as the building was in existence by May 12, 1958 and has a side yard at least five feet wide, and provided that the addition will not decrease the width of the existing side yard. The Board concurs with the Zoning Administrator that, at the time the Appellant submitted the fifth building permit application, § 405.8 was inapplicable because the subject property no longer contained a house in existence on or before May 12, 1958. The parties did not dispute that the pre-1958 house originally located on the subject property had been completely demolished by mid-March 2007, before the Appellant submitted the fifth permit application in mid-April 2007. Accordingly, the Board finds no error by the Zoning Administrator in his decision not to approve the permit to reconstruct the nonconforming one-family dwelling on the ground of noncompliance with side yard requirements.

The Board also concurs with the Zoning Administrator that § 2001.6 was inapplicable to allow reconstruction of the nonconforming structure because the damage to the house was not the result of a casualty or act of God. The Appellant did not contend that damage caused by termites constituted an "act of God," in that termite damage was not a natural disaster akin to a hurricane

or tsunami. However, the Appellant argued that the damage to the house on the subject property was the result of a "casualty." The Board did not find the Appellant's arguments persuasive.

"Casualty" is not defined in the Zoning Regulations. In accordance with § 199.2(g),[3] the Board consulted Webster's Unabridged Dictionary, which lists several definitions for "casualty." The Appellant urged the Board to adopt one of those definitions – "a person or thing that has failed, been injured, lost or destroyed as a result of an uncontrollable circumstance or some action" (Webster's Third New International Dictionary (Unabridged) (2002)) – and argued that the termite damage to the house was uncontrollable because the infestation and resulting damage had occurred before the Appellant acquired the property. DCRA asserted that a different definition – "an unfortunate occurrence, something that happens unexpectedly and without design, serious or fatal accident, disaster" – was more appropriate in the context of zoning.[4] The intervenors cited definitions describing a "casualty" as a sudden loss or an accident,[5] and argued that termite damage, a progressive deterioration, could not be considered a casualty.

The Board concurs with the Zoning Administrator that termite damage does not constitute a "casualty" for purposes of § 2001.6. Termite damage would not be considered a casualty even under the definition favored by the Appellant, because whether an event constitutes a "casualty" depends on the nature of the event – for example, how sudden it is, and whether it is foreseeable – and not by the timing of its discovery. The salient aspects of the definitions of "casualty" are the sudden nature of the occurrence, which is unexpected and unforeseeable, as well as the lack of control over the event. The Board concludes that the damage that occurred to the nonconforming structure at the subject property, which the Appellant attributed to termite infestation and rot due to prolonged exposure to ground water, was not the result of a casualty for purposes of § 2001.6, because the damage was not sudden but occurred over a period of years, was not unexpected or unforeseeable in a wood-frame dwelling at least seventy years old when acquired by the Appellant, and was in the nature of a gradual deterioration that could have been controlled, such as by means of an inspection and treatment for termite infestation.[6]

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[3] Subsection 199.2(g) states that "Words not defined in this section shall have the meanings given in *Webster's Unabridged Dictionary*."

[4] According to DCRA, the dictionary defines "casualty" as "an unfortunately occurrence," "serious or fatal accident: disaster," or "a person or thing that has failed, been injured, lost, or destroyed as the result of an uncontrollable circumstance or some action: victim," where "occurrence" means "something that takes place, *esp*. something that happens unexpectedly and without design," and a "disaster" is "a sudden calamitous event producing great material damage, loss and distress." DCRA asserted that "disaster" was synonymous with "catastrophe" and "cataclysm," which also "connote the sudden and unexpected, with attendant notions of lack of foresight." Webster's Unabridged Dictionary (3rd edition).

[5] John Lemoine cited the first definition of "casualty" in Webster's New Universal Unabridged Dictionary (1983) as "accident, that which comes by chance or without design, or without being foreseen; contingency."

[6] In considering the context of § 2001.6, the Board noted an inconsistency in three subsections of § 2001 that govern the reconstruction of nonconforming structures that have been damaged. One provision, § 2001.4, does not refer to "casualty" but applies to nonconforming structures that have been "destroyed by fire, collapse, explosion, or act of God," while §§ 2001.5 and 2001.6 both apply when damage to a nonconforming structure results from "a casualty or act of God." The Board was not persuaded by the Appellant's argument that the wording of these three provisions

Accordingly, the Board concludes that the Zoning Administrator did not err in deciding that the nonconforming structure at the subject property had not been damaged as a result of a casualty or act of God and therefore that the Appellant could not reconstruct the one-family dwelling under § 2001.6.

The Appellant also argued that the Zoning Administrator was barred from denying the fifth building permit and the reconstruction of the nonconforming house on the grounds of the equitable doctrines of estoppel and laches. The Appellant claimed that the "DCRA-authorized demolition of a portion of the original structure" would not have been undertaken if the Appellant had known that "rebuilding a portion of the existing single-family dwelling would subsequently not be permitted by the Zoning Administrator and/or DCRA."

To succeed on a claim for estoppel, the Appellant must make a six-part showing: (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance on (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations, and (6) equities that strongly favor the Appellant. *See, e.g., Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427, 444 (D.C. 2008)*; Bannum, Inc. v. District of Columbia Board of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006); *Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981). The doctrine of equitable estoppel is judicially disfavored in zoning cases because of the important public interest in the integrity and enforcement of the zoning regulations. *Id*. In this case, the Appellant's claim of estoppel fails because at least five of the elements are lacking.

The Board finds that the Appellant did not make any "expensive and permanent improvements" that would satisfy the first element of a showing of estoppel. Rather, the Appellant's claim rests on the destruction and removal of the house that was originally located on the subject property. The Board was not persuaded that the Appellant reasonably relied on affirmative acts of the District government in demolishing the house. The Appellant was not acting at the behest or under the direction of DCRA in removing the house; rather, the Appellant sought the fourth building permit, for permission to demolish a portion of the house, after the structural engineer hired by the Appellant determined that the house was in danger of collapse. DCRA's action in approving a permit requested by the Appellant did not constitute an affirmative act of the District government that caused the Appellant to decide her course of action with respect to the subject

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necessarily made "casualty" synonymous with fire, collapse, or explosion. A fire, collapse, or explosion might be deemed a casualty in a given case, but, after review of the dictionary definitions, the Board concludes that a casualty is not necessarily limited to "fire, collapse, or explosion" but is an event that is unforeseeable, uncontrollable, or sudden. A "collapse" would not necessarily constitute a "casualty," such as when the collapse results from a gradual, progressive cause of damage such as termite infestation or rot. Nor did the Board concur with the Appellant that the Zoning Commission in Order No. 403 (Case No. 81-17; July 18, 1983) "defined casualty based on the result, not the cause or origin or any concept of fault." The Appellant's characterization of the Zoning Commission's action in Order No. 403 was somewhat distorted, as the Commission indicated that the Board would not have to look at a determination or cause of the origin of a fire, for instance, and not the underlying cause of any damage to a nonconforming structure.

property; nor did the Appellant act in reliance on any action by DCRA. The improvements made by the Appellant – that is, the addition – were made prior to issuance of the fourth building permit, and were made at the Appellant's own risk, given that she elected not to obtain an inspection of the property that could have discovered the structural damage to the house due to prior termite infestations and rot. Demolition of the house did not result from any action of DCRA, except to issue permits requested by the Appellant based on her representations of her plans for the property. While the Board does not find that the Appellant acted in bad faith with respect to the applications for the fourth and fifth permits, the Board also cannot find that the equities favor the Appellant in this case. The Appellant knew or should have known about a potential zoning issue related to nonconforming side yards at the subject property, and she proceeded at her own risk in constructing an addition with the same nonconforming side yards without first assessing the structural integrity of the original house. As the project progressed, the Appellant made a series of discoveries about the property that lead to the various permit applications. These factors were incidental to the property and the project, and were not the result of any action by DCRA. Under the circumstances of this case, the equities require the application and enforcement of the zoning regulations.

Finally, the Appellant also argued that denial of the fifth permit application was barred by the doctrine of laches, because "the District 'slept on its rights' with respect to any claim as to the ability of Appellant to rebuild the structurally unsound single family house." The Appellant's claim of laches was based on a perceived lag associated with an almost 33-month period between issuance of the first permit, which allowed construction of the addition, and the denial of the fifth application almost two years after issuance of the second permit, which allowed reconstruction of a portion of the house, and six months after the issuance of the fourth permit, which authorized demolition of the remaining portion of the house.

The District of Columbia Court of Appeals has held that:

> "Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." 3 Rathkopf, Law of Zoning and Planning, at 67-1 (3d ed. 1972). It is often claimed "where the inactivity of the officials charged with the enforcement of the ordinance has misled the owner into acts in violation of the ordinance . . . or has misled persons into purchasing the property in ignorance of the illegality of the use or structure." Id. at 67-2. …[A] claim of laches in the zoning context is not judicially favored and is rarely applied "except in the clearest and most compelling circumstances." Where a party can prove inexcusable delay which has resulted in substantial prejudice, however, laches may be found.

Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978) (citations omitted). Application of the doctrine of laches requires an unreasonable delay in seeking enforcement of the zoning regulations and resulting prejudice to the party asserting the

defense. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 925 (D.C. 1980).

First, the denial of the fifth building permit did not involve the enforcement of the zoning regulations. Unlike the stop work order that was in effect at the time, the denial of the permit was not initiated by the government in response to a violation, but was an action triggered by an application filed by the Appellant. No right of the government was involved.

Even if the doctrine of laches applied to a permit denial, the Board was not persuaded by the Appellant's claim of unreasonable delay in denying the fifth building permit application based on the elapsed time since the issuance of the first permit. The Appellant requested a series of permits that reflected evolving conditions at the subject property. The Appellant received the fourth permit in February 2007, and applied for the fifth permit in April 2007. The Zoning Administrator made his decision not to approve the fifth application less than six months later, in September 2007. The Board does not find five months an unreasonable delay under these circumstances. Nor does the Board find any resulting prejudice to the Appellant due to the five-month interval between the application for and the denial of the fifth permit. The interval was relatively short in duration, and the issuance of a stop work order, in April 2007 for exceeding the scope of the fourth permit, prevented incurrence of additional costs of rebuilding the house while a decision on the fifth permit was pending. Accordingly, the Board rejects as without merit the Appellant's claim that denial of the fifth permit application was barred by the doctrine of laches.

For the reasons stated above, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the decision by the Zoning Administrator to deny the issuance of a building permit allowing the reconstruction of a portion of a one-family dwelling in the R-1-B District at premises 5013 Belt Road, N.W. (Square 1756, Lot 64). Accordingly, it is therefore **ORDERED** that the appeal is **DENIED.**

VOTE: 4-0-1 (Ruthanne G. Miller, Marc D. Loud, Mary Oates Walker and Shane L. Dettman to DENY the appeal; Gregory N. Jeffries not present, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Pursuant to § 3125.10, a majority of Board members approved the issuance of this order, including Meridith H. Moldenhauer who read the record.

FINAL DATE OF ORDER: OCTOBER 30, 2009

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.